FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 7]

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Introduction

A. Inclusion of the topic in the programme of work of the Commission

1. A proposal for a new topic entitled "Formation and evidence of customary international law" was discussed in the Working Group on the long-term programme of work during the sixty-second and sixty-third sessions of the International Law Commission, in 2010 and 2011 respectively.[1] The present note should be read together with the syllabus attached as annex I to the Commission's 2011 report, which contains an extensive list of background materials. Annex I began by noting that "Questions relating to sources lie at the heart of international law. The Commission's work in this field has been among its most important and successful, but has been largely confined to the law of treaties".[2]

2. At its sixty-third session, the Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work, on the basis of the syllabus at annex I.[3]

3. Support was expressed for the topic in the Sixth Committee during the sixty-sixth session of the General Assembly in 2011. It was suggested that the outcome should result in a practical guide, with commentaries, for judges, government lawyers and practitioners. While the point was made that the aim should not be to codify the topic itself, it was also observed that it would be difficult to systematize the formative process without undermining

[1] See *Yearbook … 2011*, vol. II (Part Two), p. 19, para. 32 and p. 175, para. 365. The Working Group was reconstituted by the Planning Group of the Commission each year during the previous quinquennium, and was chaired by Mr. Enrique Candioti.

[2] *Ibid.*, annex I, p. 183, para. 1.

[3] *Ibid.*, p. 175, para. 365.

the very essence of custom, its flexibility and constant evolution. Concerning the methodology, the importance of making a differentiation between State practice and jurisprudence of international courts and tribunals on the one hand, and the practice and jurisprudence of domestic courts on the other, was stressed. The Commission was also urged to proceed with caution in considering the role of unilateral acts in identifying customary international law.[4]

4. By paragraph 7 of its resolution 66/98 of 9 December 2011, the General Assembly took note of the decision of the Commission to include the topic "Formation and evidence of customary international law" in its long-term programme of work, and also of the respective comments made by Member States in the Sixth Committee.

5. At its sixty-fourth session, in 2012, the Commission decided to place the topic "Formation and evidence of customary international law" on its current programme of work and appointed Sir Michael Wood as Special Rapporteur for the topic.[5]

6. The present note sets out the Special Rapporteur's initial thoughts, particularly on the scope of the topic. It also outlines a tentative programme of work for the consideration of the topic, and if possible its conclusion, during the present quinquennium (2012–2016).

7. Chapter I of the note lists a number of preliminary points that will need to be covered. In chapter II, the Special Rapporteur discusses the scope of the topic and possible outcomes of the Commission's work on the topic. A tentative programme of work is set out in chapter III.

B. Aim of the present note

8. The discussions that took place within the Working Group on the long-term programme of work during the previous quinquennium were of great assistance in formulating the previously mentioned syllabus for the topic.[6] The syllabus sought to reflect many of the views expressed in the Working Group. But, for obvious reasons, many of the present members of the Commission did not take part in those discussions.

9. This note has been prepared in order to stimulate an initial debate and exchange of views on the topic during the second part of the Commission's sixty-fourth session, in 2012. Rather than attempt to get into details, it is more in the nature of a series of headline points, aimed at giving a broad overview of the topic and offering a focus (or a target) for the Commission's discussions in the second part of the 2012 session.

10. The Special Rapporteur's principal aim during the second part of the 2012 session is to seek initial views of members of the Commission on the scope of the topic, the methodology to be employed and possible outcomes. The Special Rapporteur would benefit greatly from hearing the initial views of the members of the Commission on the topic in general, in the light of the preliminary thoughts in the following sections of this note. Those views will assist in the drafting of the first (preliminary) report in good time for the Commission's sixty-fifth session in 2013.

[4] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat (A/CN.4/650), para. 65.

[5] *Yearbook … 2012*, vol. I, 3132nd meeting.

[6] *Yearbook … 2011*, vol. II (Part 2), annex I.

Chapter I

Preliminary points

11. The following points could be covered in a first preliminary report, in 2013.

A. Previous work of the Commission related to the topic

12. Much of the Commission's work has been concerned with the identification of customary international law, although it has often been cautious about distinguishing between the codification of international law and its progressive development. It dealt directly with the formation of customary international law, for example, in connection with what became article 38 of the 1969 Vienna Convention on the Law of Treaties.[7] And in its first years, the Commission had on its agenda the topic "Ways and means of making the evidence of customary international law more readily available".[8]

B. Work of the International Law Association on the formation of customary international law

13. The work of the International Law Association, between 1984/85 and 2000, culminated in the adoption in 2000 of the London Statement of Principles Applicable to the Formation of General Customary International Law (with commentary).[9] The Association's work, which consists of 33 principles and associated commentary, resulted in both supporting and critical reactions, which can be reviewed as well.

[7] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[8] At its first and second sessions, in 1949 and 1950, the Commission, in accordance with the mandate in article 24 of its statute, considered the topic "Ways and means of making the evidence of customary international law more readily available". The outcome was an influential report that led to various important publications on a national and an international level. See *Yearbook … 1950*, vol. II, document A/1316, pp. 5 *et seq.*, paras. 24–94.

[9] Resolution 16/2000 (Formation of General Customary International Law), adopted on 29 July 2000 by the International Law Association. See International Law Association, *Report of the Sixty-ninth Conference, held in London, 25–29th July 2000*, p. 39. For the plenary debate, see *ibid.*, pp. 922–926. The *London Statement of Principles* is at pp. 712–777, and the report of the working session of the Committee on Formation of (General) Customary International Law, held in 2000, is at pp. 778–790. The Committee's six interim reports contain more detailed material.

C. Customary international law as a source of public international law and its relationship to other sources

14. By way of background, it may be interesting to look at the *travaux préparatoires* of Article 38, paragraph 1, of the Statute of the International Court of Justice, which is often regarded as "badly drafted".[10] The relationship between customary international law and treaties is an important aspect of the topic, to be discussed in detail in a later report. Also to be covered is the relationship of "customary international law" to "general international law", "general principles of law" and "general principles of international law". (The term "general international law" is often found nowadays, but it seems to have a somewhat different connotation from "customary international law".) It is important to distinguish between rules of customary international law and comity/mere usage, between customary law and "soft law", and between *lex lata* and *lex ferenda*.

D. Terminology/definitions

15. To set the scene, there should be some discussion of the use and meaning of the term "customary international law" or "rules of customary international law", which seem to be the expressions in most common use (others are "international customary law", "custom" and "international custom"). The establishment of a short lexicon of relevant terms, in the six official languages of the United Nations, could be useful.

E. Importance and role of customary international law within the international legal system

16. It could be useful to discuss briefly customary international law "as law", and the challenges that have occasionally been addressed to its role within the international legal system.

[10] *Ibid.*, final report of the Committee on Formation of Customary (General) International Law, p. 716, para. 6.

F. Theories of custom and approaches to the identification of rules of customary international law

17. A brief description of the principal theories of custom, as they emerge from writings on the subject, may assist in informing the approach to be adopted eventually by the Commission. The theoretical underpinnings of the subject are important (for example, as to the relative roles of practice and *opinio juris*), even though the ultimate aim will be to provide a practical aid to those called upon to investigate rules of customary international law.

G. Methodology

18. In the preliminary view of the Special Rapporteur, the most reliable guidance on the topic is likely to be found in the case law of international courts and tribunals, particularly the International Court of Justice and the Permanent Court of International Justice. The preliminary report could include a descriptive survey of the approach to customary international law by international judicial bodies, chiefly in the case law of the International Court of Justice.[11] Guidance may also be found in the case law of national courts, codification efforts by non-governmental organizations and the writings of publicists.

19. It will be necessary to address general questions of methodology, such as the relative weight to be accorded to empirical research into State practice, as against deductive reasoning. The difficulties and options are well set out in the introduction to the final report of the Committee of the International Law Association.[12] It is also the case that practical considerations may affect methodology, especially in a world of nearly 200 States, but this is not really a new problem. The practice of other international persons, in particular international organizations, may also be important.

[11] See, most recently, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), I.C.J. Reports 2012*, p. 122, para. 55, where the Court refers to "the criteria which it has repeatedly laid down for identifying a rule of customary international law".

[12] International Law Association, *Report of the Sixty-ninth Conference* (footnote 9 above), final report of the Committee on Formation of Customary (General) International Law (footnote 10 above), p. 712, paras. 1–10.

Chapter II

Scope of the topic and possible outcomes of the Commission's work

20. On a practical level, it is important to define the scope of the topic, and to consider possible outcomes, at an early stage. The purpose of this chapter of the note is to assist the Commission to do that. In the first paragraph of annex I to the Commission's 2011 report, it is stated that the title of the topic "would not preclude the Commission from entering upon related aspects if this proved desirable, but the focus would be on formation (the process by which rules of customary international law develop) and evidence (the identification of such rules)".[13] The Special Rapporteur considers that this statement accurately describes the scope of the topic.

21. To avoid unnecessary overlap, the scope of the topic needs to be clearly delimited in relation to other topics that have been on the Commission's agenda, past and present. These include "Fragmentation of international law: difficulties arising from the diversification and expansion of international law"[14] and "Treaties over time".[15] This should not be difficult in practice;

[13] *Yearbook … 2011*, vol. II (Part Two), p. 183, annex I, para. 1.

[14] For the outcome of the Commission's work on that topic, see *Yearbook … 2006*, vol. II (Part Two), p. 177, para. 251; and the report of the Study Group finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1).

[15] For a summary of the Commission's work on that topic from 2008 to 2011, see *Yearbook … 2011*, vol. II (Part Two), pp. 168–171, paras. 333–344.

the dividing lines are likely to be reasonably clear. For example, while the effect of treaties on the formation of customary international law is part of the present topic, the role of customary international law in the interpretation of treaties is not.

22. The topic will cover the whole of customary international law. It is the view of the Special Rapporteur that, given the unity of international law and the fact that "international law is a legal system",[16] it is neither helpful nor in accordance with principle, for the purposes of the present topic, to break the law up into separate specialist fields. The same basic approach to the formation and identification of customary international law applies regardless of the field of law under consideration. The Commission's work on this topic will be equally relevant to all fields of international law, including, for example, "customary human rights law", "customary international humanitarian law" and "customary international criminal law". It is, however, for consideration whether, and if so to what degree, different techniques might be appropriate for the identification of particular rules of customary international law.[17]

23. A particular question to consider is whether the topic should include the emergence of new peremptory norms of general international law ("*jus cogens*").[18] The Special Rapporteur's present view is that this is a separate matter, which should not be dealt with as part of the present topic. For example, peremptory norms may be found in treaties just as much as in customary international law.[19]

24. It should not be expected that the outcome will be a series of hard-and-fast rules for the determination of rules of customary international law.[20] Instead, the aim is to elucidate the process of the formation and determination of rules of customary international law through guidance and practice. A starting point for a discussion of the overall aim of the Commission's consideration of the topic can be found in annex I:

> The aim is not to seek to codify "rules" for the formation of customary international law. Instead, the aim is to produce authoritative guidance for those called upon to identify customary international law, including national and international judges. It will be important not to be overly prescriptive. Flexibility remains an essential feature of the formation of customary international law. In view of this, the Commission's final output in this field could take one of a number of forms. One possibility would be a series of propositions, with commentaries.[21]

25. The Special Rapporteur suggests that the appropriate outcome for the Commission's work on the present topic should be a set of "conclusions" with commentaries.[22]

[16] *Yearbook … 2006*, vol. II (Part Two), para. 251 (1).

[17] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), I.C.J. Reports 2012*, p. 37, para. 73 ("for the purposes of the present case the most pertinent State practice is to be found in those national judicial decisions").

[18] Vienna Convention on the Law of Treaties, art. 64.

[19] The same conclusion was reached by the International Law Association. See International Law Association, *Report of the Sixty-ninth Conference* (footnote 9 above), final report of the Committee on the Formation of Customary (General) International Law, introduction, pp. 716–717, para. 8.

[20] The International Law Association refers to "a statement of the relevant rules and principles, as the Committee understands them … some practical guidance for those called upon to apply or advise on the law, as well as for scholars and students. Many have a need for relatively concise and clear guidelines on a matter which often causes considerable perplexity" (*ibid.*, pp. 714–715, para. 4).

[21] *Yearbook … 2011*, vol. II (Part Two), annex I, pp. 183, para. 4.

[22] A similar approach was adopted by the International Law Association (footnote 9 above).

Chapter III

Tentative schedule for the development of the topic

26. In its 2011 report to the General Assembly, the Commission set out, in lapidary fashion, what is expected of Special Rapporteurs.[23] Among other things, they are expected to prepare each year a substantive report, preferably limited to no more than 50 pages. In connection with the work of the Planning Group, the Commission said that the Group

> should cooperate with Special Rapporteurs and coordinators of Study Groups to define, at the beginning of any new topic, a tentative schedule for the development of the topic over a number of years as may be required, and periodically review the attainment of annual targets in such schedule, updating it when appropriate.[24]

27. In the same report, it was suggested that, for convenience, the topic should be considered in four stages: underlying issues and collection of materials; some central questions concerning the identification of State practice and *opinio juris*; particular topics; and conclusions.[25] The following tentative schedule is therefore proposed for the development of the topic "Formation and evidence of customary international law":

> 2012: Preliminary note and initial discussion within the Commission. The main aim is to enable the Special Rapporteur to gather initial views from members of the Commission concerning the scope, methodology and possible outcome of the work on the topic, and to consider information to be sought from States.[26]
>
> 2013: First report of the Special Rapporteur (on some preliminary points, including those mentioned in chap. I above), and gathering further materials.

[23] *Yearbook … 2011*, vol. II (Part Two), p. 176, para. 372.

[24] *Ibid.*, p. 176, para. 378 (*c*).

[25] *Ibid.*, p. 183, annex I, para. 6.

[26] Such information could include (*a*) any official statements (e.g. in court proceedings) concerning the formation of international customary law; (*b*) any significant cases in national or regional courts shedding light on the question; and (*c*) any writings or work being done at national institutes (beyond what is listed in *Yearbook … 2011*, vol. II (Part Two), annex I).

2014: Second report of the Special Rapporteur (discussing State practice and *opinio juris*).[27] This report would contain some "conclusions".

2015: Third report of the Special Rapporteur (on certain particular topics).[28] This report too would contain further "conclusions".

2016: Fourth report of the Special Rapporteur: consolidated and reworked full set of "conclusions", for discussion and adoption by the Commission.

[27] It is suggested that the second stage could cover some central questions of the traditional approach to the identification of rules of customary international law, in particular State practice and *opinio juris*:

"(i) Identification of State practice. What counts as 'State practice'? Acts and omissions, verbal and physical acts. How may States change their position on a rule of international law? Decisions of domestic courts and tribunals (and the executive's response thereto). Beyond the State, whose acts? Certain international organizations, like the European Union? 'Representativeness' of State practice (including regional diversity).

"(ii) Nature, function and identification of *opinio juris sive necessitatis*.

"(iii) Relationship between the two elements: State practice and *opinio juris sive necessitatis*, and their respective roles in the identification of customary international law.

"(iv) How new rules of customary international law emerge; how unilateral measures by States may lead to the development of new rules; criteria for assessing whether deviations from a customary rule have given rise to a change in customary law; potential role of silence/acquiescence.

"(v) The role of 'specially affected States'.

"(vi) The time element, and the density of practice; 'instant' customary international law.

"(vii) Whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs" (*ibid.*, para. 8).

[28] It is suggested that a third stage could cover particular topics such as:

"(i) The 'persistent objector' theory.

"(ii) Treaties and the formation of customary international law; treaties as possible evidence of customary international law; the 'mutual influence'/interdependence between treaties and customary international law.

"(iii) Resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

"(iv) Formation and identification of rules of special customary international law between certain States (regional, subregional, local or bilateral—'individualized' rules of customary international law). Does consent play a special role in the formation of special rules of customary international law?" (*ibid.*, para. 9).